Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting	)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the	)	
Communications Act of 1934, as amended	)	

COMMENTS IN CONNECTION WITH COURT REMAND
OF NON-ACCOUNTING SAFEGUARDS ORDER

Qwest Communications International Inc. submits the following comments in response to the *Public Notice*[1] issued in connection with the D.C. Circuit's remand of the Commission's *Third Order on Reconsideration*[2] in the above-captioned proceeding.[3] In its *Public Notice*, the Commission seeks comment on the meaning of "interLATA service" for the purposes of section 271, and whether the provider of an information service is necessarily providing telecommunications. The Commission also seeks comment on whether the analysis depends upon whether the information service provider is transmitting services over its own telecommunications facilities rather than using facilities obtained from other carriers. The Commission also specifically seeks comment on the effect that other portions of the Act should have on any interpretation of the term "interLATA service." Finally, the Commission seeks comment on its 1998 Report to Congress,[4] and whether that Report supported

[1] *Comments Requested in Connection with Court Remand of Non-Accounting Safeguards Order, Public Notice*, CC Docket No. 96-149, DA 00-2530 (Nov. 8, 2000).

[2] *In the Matter of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, *Third Order on Reconsideration*, 14 FCC Rcd. 16299 (1999).

[3] *See Bell Atlantic Telephone Cos. v. Federal Communications Commission*, No. 99-1479 (D.C. Cir. Oct. 27, 2000) (order granting Commission's motion for remand).

[4] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report to Congress*, 13 FCC Rcd. 11501 (1998).

the conclusion that "interLATA services" do not encompass interLATA information services.

I. When A BOC Provides Information Services, It Is Not Providing A Telecommunications Service That Falls Within The Scope Of Section 271's Prohibition Of BOC-Provided "InterLATA Services."

Section 271's prohibition of BOC-provided interLATA services does not encompass information services. Section 271(a) states that neither a BOC nor a BOC-affiliate may "provide interLATA services" except as otherwise allowed under the remainder of section 271.[5] The term "interLATA service" is expressly defined by the Act as "*telecommunications*" between points in two different LATAs.[6] Accordingly, to fall within the scope of section 271(a), a BOC or BOC-affiliate must "provide" "telecommunications."

The term "telecommunications," in turn, is defined as "the *transmission*, between or among points specified by the user, of information of the user's choosing, *without change in the form or content* of the information as sent and received."[7] In contrast to "telecommunications," which is defined as transmission *without* change in form or content, the Act defines another set of services—information services—that by definition involve an "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications*."[8] Because an information service necessarily entails an alteration of the form or content of the transmitted information, an information service cannot constitute the provision of telecommunications. In other words, telecommunications services and information services are mutually exclusive categories.

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[5] 47 U.S.C. § 271(a).

[6] 47 U.S.C. § 153(21) (emphasis added).

[7] *Id.* § 153(43) (emphases added).

[8] *Id.* § 153(20) (emphasis added).

A. The Conclusion That The Provision Of An Information Service Cannot Constitute The Provision Of Telecommunications Is Unequivocally Supported By The Commission's 1998 Report To Congress And Other Commission Orders.

Using the same definitions outlined above, the Commission, in orders issued *after* the *Non-Accounting Safeguards Order*,[9] has repeatedly confirmed that the provision of an information service cannot constitute the provision of telecommunications. For instance, in its *Report to Congress*, submitted in response to Congress's direction to review the definitions of (among other things) "telecommunications," "telecommunications service," and "information service," the Commission concluded that "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive."[10]

Moreover, the Commission explained that "Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.'"[11] The Commission further explained when a carrier provides simple telecommunications, and when it provides an information service:

> [A]n entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers "telecommunications." *By contrast, when an entity offers transmission incorporating the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information," it does not offer telecommunications.* Rather, it offers an "information service" even though it *uses* telecommunications to do so.

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[9] *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21905 (1996).

[10] *Report to Congress,* 14 FCC Rcd. at 11507 ¶ 13; *see also Universal Service Order*, 12 FCC Rcd. 8776, 9180 ¶ 789 (1997) (finding that "telecommunications" by definition requires transmission of information without change to its form or content, whereas a provider of "information services" by definition does "alter the format of information").

[11] *Report to Congress*, 14 FCC Rcd. at 11507-8 ¶ 13.

> We believe that this reading of the statute is most consistent with the 1996 Act's text, its legislative history, and its procompetitive, deregulatory goals.[12]

In other words, the construction of the statutory definitions demonstrate that "an entity is *not* deemed to be providing 'telecommunications,' *notwithstanding its transmission of user information*, in cases in which the entity is altering the form or content of that information."[13]

Thus, an information service provider *uses* telecommunications but does not itself *provide* telecommunications. As the Commission found:

> [A]n entity should be deemed to provide telecommunications . . . only when the entity provides a transparent transmission path, and does not "change . . . the form and content" of the information. When an entity offers subscribers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications," it does not *provide* telecommunications; it is *using* telecommunications.[14]

So, the Commission's own interpretation unequivocally validates what the statute itself plainly states: "information services" are not "telecommunications," and do not become "telecommunications" simply because they incorporate transmission. Furthermore, because section 271 only prohibits a BOC from "provid[ing]

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[12] *Id.*, 14 FCC Rcd. at 11520 ¶ 39 (emphases added); *see also id.* at 11529 ¶ 58 ("An offering that constitutes a single service from the end user's standpoint is not subject to common carrier regulation simply by virtue of the fact that it involves telecommunications components.").

[13] *Id.* at 11520-21 ¶ 40 (second emphasis added).

[14] *Id.* at 11521 ¶ 41 (emphases added); *see also id.* at 11522-23 ¶ 43 ("The Senate Report stated in unambiguous terms that its definition of telecommunications 'excludes those services . . . that are defined as information services.'" Information service providers, the Report explained, "'do not "provide" telecommunications services; they are *users* of telecommunications services.'") (quoting S. Rep. No. 104-23, at 18, 28 (1995) (footnote omitted; emphasis added)).

interLATA services,"[15] and "interLATA service" "*means telecommunications*" between LATAs,[16] section 271's prohibition is limited to the BOCs' provision of interLATA "telecommunications." Accordingly, under the express definition of "interLATA services," providers of information services do *not* "provide" "interLATA services" within the scope of section 271.

B. The Conclusion That The Provision Of An Information Service Cannot Constitute The Provision Of Telecommunications Is Also Supported By The Remainder Of The Act.

This conclusion that an entity does not provide telecommunications when it provides an information service is also supported by the provisions of section 272. Specifically, section 272 consistently affords separate treatment to "telecommunications services" and "information services," both in the provisions that impose a separate affiliate requirement, and in the provisions that establish different "sunset" dates for those services.

First, section 272(a)(2) sets out three subdivisions covering the types of services for which a separate affiliate is sometimes required. Subparagraph (A) covers "[m]anufacturing activities"; subparagraph (B) covers origination of "interLATA telecommunications services"; and subparagraph (C) covers "[i]nterLATA information services."[17] This categorization alone demonstrates the distinction between telecommunications and information services. Indeed, if a BOC necessarily provided telecommunications when it provided an information service, then the separate affiliate requirement for a BOC's provision of interLATA information services would be redundant.

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[15] 47 U.S.C. § 271(a).

[16] *Id.* § 153(21) (emphasis added).

[17] *Id.* § 272(a)(2)(A)-(C).

Second, section 272(f), which establishes the "sunset" dates of the various separate-affiliate requirements, further confirms that section 271 is limited to telecommunications and does not include information services.[18] This section provides for a sunset date of the separate affiliate requirement for "manufacturing" and "interLATA telecommunications services" of three years after the BOC "is authorized to provide interLATA telecommunications services under section 271(d)" (unless extended by the Commission).[19] In contrast, this section separately establishes a different sunset date for "interLATA information services" of four years after enactment of the 1996 Act (unless extended by the Commission).[20] By tying the sunset of the separate-affiliate requirement for interLATA telecommunications services to approval of a BOC's section 271 application, while tying the sunset of the separate-affiliate requirement for interLATA information services to enactment of the 1996 Act, Congress underscored its understanding that section 271 has no application to "interLATA information services."

Finally, Congress's use of the phrase "interLATA telecommunications services" in section 272(a)(2)(B) does not imply that "interLATA services," standing alone, necessarily extends to "telecommunications services" and "telecommunications" (and thereby reaches "information services"). In reaching a contrary conclusion, the Commission appears to have overlooked the fact that "telecommunications" and "telecommunications service" are discrete, separately defined terms. "Telecommunications" means "the transmission . . . of information of the user's choosing, without change in the form or content of the information as sent and received."[21] "Telecommunications service" is more narrowly defined: "the

[18] *Id.* § 272(f).

[19] *Id.* § 272(f)(1).

[20] *Id.* § 272(f)(2).

[21] 47 U.S.C. § 153(43).

offering of telecommunications for a fee *directly to the public*, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[22] As the Commission has explained, the "inclusion of the term 'directly to the public' is intended to encompass only telecommunications provided on a common carrier basis."[23] Thus, "[c]ommon carriers can be distinguished from private network operators, which serve the internal telecommunications needs of, for example, a large corporation, rather than selling telecommunications to the general public."[24]

By using the narrower term "interLATA telecommunications services" in section 272(a)(2)(B), Congress distinguished common-carrier transmission services from non-common-carrier transmission services and applied the separate-affiliate and other safeguards of section 272 only to the former; thus, the Act allows a BOC to directly provide *private-line* interLATA telecommunications (when such services may be provided at all under section 271). In other words, the language of section 272(a)(2)(B) requires a separate affiliate only for common-carrier activities.

Furthermore, within the structure of section 272(a)(2), Congress used parallel formulations in subparagraphs (B) and (C): to highlight the *contrast* with "interLATA information services" in subparagraph (C), it used "interLATA telecommunications services" in subparagraph (B). There is no basis for inferring that, by using the term "interLATA telecommunications services," Congress intended to contradict its own definitional limitation, under which "interLATA

[22] *Id.* § 153(46) (emphasis added).

[23] *Report to Congress*, 13 FCC Rcd. at 11560 ¶ 124; *see also id.* at 11564-65 ¶ 131; *Universal Service Order*, 12 FCC Rcd. at 917-78 ¶ 785 (citing *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976)).

[24] *Report to Congress*, 13 FCC Rcd. at 11560 ¶ 124.

services," and therefore the reach of section 271, extends only to telecommunications, *not* to information services.[25]

II. Alternatively, The Commission Must, At A Minimum, Construe Section 271 To Permit The BOCs To Provide InterLATA Information Services Where The BOC Is Not A Facilities-Based Carrier Of The Transmission Component Of The Service.

The Commission has previously attempted to avoid the clear statutory delineation by proclaiming that interLATA information services necessarily utilize a bundled interLATA telecommunications transmission component, and that a BOC must obtain section 271 authorization prior to providing the in-region, interLATA telecommunications transmission component of an interLATA information service.[26] Under the Commission's analysis, this would be true, even if the telecommunications transmission component standing alone, had never itself constituted a telecommunications service under the Act.[27]

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[25] One final observation which bears mentioning: the Commission has intimated in the past that the restrictions of section 271 should be construed as stringently as possible to ensure that the BOCs will abide by the market-opening requirements of section 251. *See In the Matter of AT&T Corp. v. Ameritech Corp.*, File Nos. E-98-41, E-98-42, E-98-43, *Memorandum Opinion and Order*, 13 FCC Rcd. 21438 (1998). The Commission's use of harsh statutory treatment as a "stick" to coerce a specific set of entities to comply with the generally applicable statutory requirements of section 251 is precisely the posture that the Commission denied in response to several lawsuits contending that section 271 was an unconstitutional bill of attainder. *See BellSouth Corp. v. FCC*, 162 F.3d 678 (D.C. Cir. 1998); *SBC Communications. Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998). The Act contains no inherent assumption of BOC misconduct—Section 271 has been adjudged to be a lawful statutory enactment because it responds (according to the courts that have reviewed it), to a legitimate economic concern with BOC dominance in the local exchange markets. *See id.* Section 271 must be interpreted in accordance with the principles of statutory interpretation—as we have stated herein—and not based on a misguided assumption of BOC lawlessness.

[26] *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Report and Order, CC Docket No. 96-149, 11 FCC Rcd 21905, 21933 ¶ 57 (1996).

[27] *See id.*

As demonstrated in the previous section, this analysis finds no support in the Act itself; nor is this analysis supported by Commission precedent that pre-dates the 1996 Act. Indeed, not only did the Commission ignore the plain statutory definitions of the 1996 Act, but the Commission ignored its past precedent as well. The Commission appears to have at least recognized its inconsistency with past precedent in the *Public Notice*, however, where it inquired if the analysis was different if the information service provider is transmitting services over its own facilities rather than using facilities obtained from other carriers.[28]

Under the Commission's past precedent, a facilities-based carrier that offers an enhanced service[29] must unbundle the transmission from the enhanced service.[30] Where a provider incorporates the transmission of another carrier into the enhanced service, however, the Commission has concluded that the enhanced component of the service "contaminates" the transmission component, and the entire offering is considered enhanced.[31]

Thus, even if there were a statutory basis to conclude that a facilities-based-interLATA-information-services provider was *providing* telecommunications along with the information service, there is certainly no basis—in either the Act or Commission precedent—to conclude that a *non*-facilities-based-information-service provider is *providing* telecommunications. In short, even if the Act were somehow construed to properly prohibit the BOCs from providing interLATA information services via their own transmission facilities, there is no theory under which the

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[28] *Public Notice* at 3.

[29] Enhanced services are generally considered to be information services under the 1996 Act. *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 21955-56 ¶ 102.

[30] *See In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, *Final Decision*, 77 FCC2d 384, 475 (1980).

[31] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Supplemental Notice, FCC 86-253, ¶ 43 n. 52 (rel. June 16, 1986).

BOCs can be prohibited from providing these services when the transmission component is acquired from another carrier.

Respectfully submitted,

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November 29, 2000

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused 1) the foregoing **COMMENTS IN CONNECTION WITH COURT REMAND OF NON-ACCOUNTING SAFEGUARDS ORDER** to be filed electronically with the FCC by using its Electronic Comment Filing System, 2) a copy of the **COMMENTS** to be served, via hand delivery, upon the persons (marked with an asterisk) listed on the attached service list and 3) a courtesy copy of the **COMMENTS** to be served, via hand delivery, upon all other persons listed on the attached service list.

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